IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 7 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ROHITBHAI KULJIBHAI GOTI

Versus

STATE OF GUJART

Appearance:

1. Criminal Revision Application No. 7 of 2002

MR YATIN SONI for Petitioner No. 1

MS HANSA PUNANI, APP for Respondent No. 1

MR RM PARMAR for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 04/02/2003

ORAL JUDGEMENT

This is a revision application under section 397 read with Section 401 of the Code of Criminal Procedure,

1973, (for short "the Code"), challenging an order dated 19/12/01 recorded by the learned Judicial Magistrate (First Class), at Palitana in Criminal Case NO. 1440 of 2000, allowing the said application and directing that the present petitioner be joined as accused no. 2 in the said case. The trial court also directed by the said order, for the issue of summons to the present petitioner for remaining present before the said court on 31/12/01.

2. It appears from the record that the second respondent, Mr.Savjibhai Madhabhai Gohil, had instituted a First Information Report before Palitana Town Police Station being Crime Register NO. 54 of 2000 for offences punishable under Sections 323, 324, 504, 506(2) read with Section 114 of IPC as well as for an offence punishable under Section 135 of the Bombay Police Act and also for an offence punishable under Section 3(1)(10) of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The said FIR was filed against the present petitioner as well as against Mr.Ishwardas B Devmurari. It seems that the said FIR underwent police investigation and at the close of investigation, chargesheet came to be filed before the said court for the said offence, against Mr.Ishwardas B Devmurari only. However, no chargesheet was filed against the present petitioner and he was not shown either as an accused person or as a person absconding.

3. Feeling aggrieved by the aforesaid action on the part of the investigating Police Officer, the second respondent submitted an application on 22nd August, 2000 before the said court, at Ex. 7, saying that the present petitioner is also an accused person, but since he is the son of a Member of the legislative Assembly, the Police Investigation Officer had not shown him as an accused person, though in fact, he had also committed the offences as stated in the FIR, and therefore, he may be joined as co-accused.

4. On receiving the said application, the trial court issued notice to the present petitioner and after hearing, the trial court found that some case was made out against the present petitioner and therefore he be joined as a co-accused.

5. Feeling aggrieved by the said order dated 19/12/01 the petitioner has preferred this revision application before this Court.

6. On receiving the revision application, "Rule" was issued and in response to the service of rule, Ms. Hansa

Punani, learned APP appears for respondent no. 1 - the State of Gujarat, whereas Mr. R M Parmar, learned advocate appears on behalf of respondent no. 2 - the original complainant.

7. I have heard the learned advocate for the petitioner, learned APP for the State and the learned advocate for the second respondent and have perused the papers.

8. The facts as above are undisputed. The petitioner was shown as one of the two accused persons in the FIR but so far the chargesheet is concerned, his name has been omitted and the chargesheet has been filed only against one accused person.

9. These facts are undisputed. The offence punishable under the provisions of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is one triable by Special Courts constituted under the said Act. It is not much in dispute that the Sessions Courts have been constituted as "Special Courts" for the trial of offences under the said Act. Therefore, Judges of the said court are required to deal with the trial of the said offence. In other words, a Magistrate may be required to commit the case of the said court and thereafter, the trial would commence. Since the matter is still pending before the learned Magistrate, the application was submitted to him by the second respondent under Section 319 of the said Code. The said provision of Section 319 may be reproduced for ready reference as follows;

> Section 319 : Power to proceed against other persons appearing to be guilty of offence-(1)Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.
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> (2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.
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> (3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he

appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1) then-

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), thecase may proceed as if such person had been an accused person when the Court took congnizance of the offence upon which the inquiry or trial was commenced.

10. On a bare reading of sub-section (1) of Section 319 of the said Code, it becomes very clear that a person not being an accused before a court, can be joined as an accused person, only in the course of an inquiry, into or trial of an offence. Then the next requirement is that the power can be exercised for joining a person as an accused person in a Criminal Case under Section 319 of the said Code, only if it appears from the evidence that any person not being the accused has committed any offence. This would mean that, it must appear from the evidence that a person not being an accused in a criminal case, has committed same offence. This further requires that the said decision can be arrived at only from the evidence and not from any other material.

11. The term "Evidence" has been defined in Section 3 of the Evidence Act, 1872 as follows;

From the above definition, it becomes very clear that oral statements made in court by witnesses or documents produced for the inspections of the court would be treated to be evidence within the four corners of Section 3 of the said Act of 1872. In the case on hand, no witness has been examined as the case is yet pending before the committing Court. The recording of evidence will commence only after the committal of case to the Special Court and after the framing of charge by that court.

12. It is, therefore, very clear that the powers under Section 319 of the Code have been exercised without any evidence on record, which is, ex facie, contrary to the positive requirement of Section 319. In fact, no person could be added as a co-accused without recording evidence.

13. In my opinion, the order impugned in this

revision application is ex facie illegal, as it contravenes the mandatory provisions contained in Section 319 of the Code. Therefore, it is necessary for this Court to interfere with the impugned order of the trial court.

14. At the same time, it is required to be observed that the State would be, naturally, at liberty to file appropriate application before appropriate court for appropriate relief at appropriate stage. This revision application has not been filed by the State and even otherwise, when it is being dismissed on the ground that the application made to the Magisterial Court was premature, the filing of this revision application cannot come in the way of the State in filing a regular application as aforesaid before the appropriate court, at appropriate stage.

15. Anyway the order impugned in this revision application is ex facie illegal and cannot be sustained on any ground. For the foregoing reasons, this revision application is allowed. The order impugned in this revision application dated 19/12/01 recorded below, at Ex. 7, by the trial court in Criminal Case NO. 1440 of 2000, is ordered to be set aside. Rule is made absolute. Direct service is permitted.

(D. P. Buch, J.)

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